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Supreme Court of the United States

No. 610

ALBERT J. McDONALD,
Petitioner and Appellant Below.

versus

ROBERT W. O'MEARA ET ALS.,
Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT WEINSTEIN,
624 Whitney Building,
New Orleans, Louisiana,
Attorney for Albert J. McDonald, Petitioner and Appellant Below.

SYLVAN J. STEINBERG,
of
RITTENBERG, WEINSTEIN & BRONFIN,
624 Whitney Bldg.,
New Orleans, Louisiana,

ROBERT B. BUTLER, JR.,
Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

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To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Albert J. McDonald, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 27, 1958; rehearing denied October 8, 1958.

I.

CITATION OF OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana in this matter is not reported, but a copy of same is appended hereto.[1]

The opinion of the United States Court of Appeals

[1] Appendix A.

for the Fifth Circuit [2] is reported in 259 F. 2d 425 (5th Cir. 1958).

II.

STATEMENT OF JURISDICTION

(i) The decree sought to be reviewed was entered on August 27, 1958.

(ii) Application for rehearing was filed on September 16, 1958, and denied on October 8, 1958.

(iii) The statutory provision that confers on this court jurisdiction to review the decree in question, by writ of certiorari, is 28 U.S.C. § 1254(1).

III.

QUESTIONS PRESENTED

1. Whether on hearing of defendant's motion for summary judgment, a court may properly resolve genuine, material issues of disputed facts adversely to plaintiff, and thereupon maintain the motion and dismiss plaintiff's suit on the grounds that there is no genuine issue as to any material fact.

2. Whether a court may properly hold that the purchaser of the leasehold rights under a mineral lease at a time when the validity and legality of same is the subject of litigation in a pending lawsuit, which has previously been put at issue by the filing of peremptory exceptions of No Right or Cause of Actions by all defendants, has not purchased a litigious right (within the meaning of the Louisiana Civil Code of 1870, Articles 2652 and 2653) which the party against whom same has been purchased is entitled to acquire by refunding the purchase price plus interest.

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[2] Appendix B.

3. Whether, under the law of Louisiana, a mineral sublessee who has taken peaceful possession of property under a sublease which grants him the right to withhold payment of rent (overriding royalty) if his sublessor's title is claimed by others and the right to purchase a lease from others for the limited purpose of protecting his leasehold rights without being held thereby to have disputed his sublessor's title, may purchase a conflicting lease from his sublessor's sole adverse claimant, to protect his leasehold rights, and thereupon, when the need for such protection has permanently ended, while still remaining in continuous, peaceful possession as tenant under his sublessor, be properly permitted to refuse to pay rent (overriding royalty) to his sublessor, even though no person was then claiming, or could possibly claim said rent (overriding royalty) adversely to his sublessor other than the sublessee himself.

4. Whether a court may properly hold that the doctrine of Judicial Estoppel is not applicable to a mineral sublessee who, having joined with his sublessor as co-plaintiff relying exclusively upon, and asserting the validity of his sublessor's title in litigation against his sublessor's adverse litigant, subsequently purchases all of the rights of said adverse litigant and attempts to assert same against his co-plaintiff and sublessor while the litigation is still pending.

5. Whether a court may properly hold that where a mineral sublessee is in peaceful possession under his sublease, producing oil from the leased premises, the delivery by the sublessee of his sublessor's overriding royalty oil (rent) to a third party purchaser, via a common carrier pipeline company, the purchase price to be indefinitely retained by the purchaser in its own hands, beyond the sublessor's reach, constitutes the delivery of

such overriding royalty oil (payment of rent) in accordance with the agreement of the parties which provides that said overriding royalty oil shall be delivered to the "sublessor's credit" in said pipeline; even though no person is claiming, or can possibly claim said overriding royalty oil adversely to the sublessor other than the sublessee himself.

6. Whether on trial of defendant's motion for summary judgment, a court may properly resolve material disputed facts adversely to plaintiff, and rely upon and utilize the facts thus resolved by coupling same with vague inferences contained in a contract, so as to thereby abrogate an expressed intent of the contract and read into it a new method of terminating same in addition to the three methods specifically provided therein.

IV.

THE STATUTES INVOLVED

This is a suit to cancel an oil, gas and mineral sublease for nonpayment of royalty (rent); This case is based on the Louisiana Civil Code of 1870, Articles 2046, 2047, 2710, 2712 and 2729[3] which are set out verbatim in Appendix C.. Motions for Summary Judgment were filed by defendants under Federal Rules of Civil Procedure, rule 56, 28 U.S.C.

This suit was filed in a Louisiana State Court, and was removed to the United States District Court by defendants on the grounds of diversity of citizenship under the provisions of 28 U.S.C. § 1332 and 28 U.S.C. § 1441.

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[3] Nonpayment of rent when due is a peremptory cause for cancellation of a lease. *Bollinger vs. Texas Company*, 232 La. 637, 95 So. 2d 132; (1957). and cases there cited.

V.

STATEMENT OF THE CASE AND REASONS

On May 7, 1955, Philip J. Daspit and others, as lessors, granted an oil, gas and mineral lease[4] to petitioner, Albert J. McDonald, as lessee. The lessors reserved the customary one-eighth royalty.[5]

On June 4, 1955, McDonald executed a mineral sublease[6] of the property to respondent-appellee, Robert W. O'Meara. By the terms of this sublease,[7] O'Meara obligated himself to carry out faithfully all of the provisions of the original lease between McDonald and the Daspits, and additionally obligated himself to pay McDonald an overriding royalty of one-eighth (1/8) of all oil and other minerals produced, without cost to McDonald and subject only to McDonald's proportionate share of severance taxes.

On January 10, 1952, Felix P. Broussard and others, as lessors, executed an oil, gas and mineral lease in favor of Tidewater Associated Oil Company (now Tidewater Oil Company) on certain lands, including the property involved in this suit; the Broussards reserved the customary one-eighth (1/8) landowners royalty. This lease evidenced the fact that the Broussards were claiming ownership of the land adversely to the Daspits and that Tidewater Oil Company was claiming ownership of the leasehold rights adversely to McDonald (Daspits' lessee) and O'Meara (McDonald's sublessee).

On October 17, 1955, the Daspits filed suit in state

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[4] Tr. pp. 34-51.
[5] Tr. p. 45.
[6] Tr. pp. 51-57.
[7] This instrument is drawn in the form of an assignment, but under well settled Louisiana jurisprudence it is, in fact, a sublease. *Roberson v. Pioneer Gas Co.* 173 La. 313; 137 So. 46, 48; (1931); *Weir v. Glassell*, 216 La. 828; 44 So. 2d 882, 885, 886 (1950).

court against the Broussards and Tidewater Oil Company to establish their ownership of the land and remove this cloud from their title.[8] McDonald and O'Meara[9] both joined as parties plaintiff to this suit, adopting the allegations of the Daspit petition, pleading validity of the Daspit title, and respectively asserting their leasehold rights under the Daspit-McDonald lease and the McDonald-O'Meara sublease.[10]

In November, 1955, while the above suit was pending. O'Meara, acting as McDonald's sublessee, took possession of the property, drilled a producing oil well thereon and began to sell and market the oil therefrom on January 1, 1956, retaining the entire proceeds in his own hands. O'Meara refused to pay the one-eighth (1/8) overriding royalty (rent) to his sublessor, McDonald, on the grounds that McDonald's leasehold rights and overriding royalty were being adversely claimed by Tidewater Oil Company in the *Daspit-Broussard* suit.

McDonald objected to O'Meara possession of these funds during pendency of the title litigation,[11] and therefore on May 31, 1956, McDonald and O'Meara entered into an "Escrow Agreement"[12] whereby O'Meara obligated himself to deposit all accrued funds, claimed by McDonald, in escrow with Citizens National Bank & Trust Company of Houma, Louisiana, and to thereafter

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[8] Tr. pp. 318-333 *Daspit et al. v. Broussard et al.* No. 17,504, 17th Judicial District Court, Parish of Terrebonne, Louisiana.

[9] Tr. pp. 338-354.

[10] This suit involved two separate controversies, i. e. (1) Ownership of the land was in controversy between the Daspits and the Broussards, and (2) Ownership of the leasehold rights was in controversy between McDonald and O'Meara, on the one hand, and Tidewater Oil Company on the other hand.

[11] McDonald, for his own protection, threatened to have the funds claimed by him, impounded by the court unless O'Meara agreed to escrow same in a bank within the jurisdiction of the court where the *Daspit-Broussard* suit was pending.

[12] Tr. pp. 54-61.

continue to purchase the oil produced and to make monthly deposits of McDonald's portion with said bank as escrow agent.[13] By the terms of the escrow agreement, such monthly deposits were to be held by said bank and were not to be delivered to McDonald unless and until:

(1) Final, unappealable judgment was rendered in the *Daspit-Broussard* suit maintaining McDonald's ownership of these funds, or

(2) The parties (Tidewater Oil Company) claiming adversely to McDonald in the *Daspit-Broussard* suit abandoned their adverse claims.

Tidewater Oil Company and the Broussards put the *Daspit-Broussard* suit at issue by filing peremptory exceptions of no right or cause of action, and thereafter O'Meara acquired all of the leasehold rights of Tidewater Oil Company to the property in question, under the Broussard-Tidewater lease,[14] by virtue of two instruments: (1) Assignment of mineral lease from Tidewater Oil Company to D. F. Jeffries, dated November 19, 1956 and recorded on November 28, 1956,[15] and (2) Assignment of mineral lease from D. F. Jeffries to Robert W. O'Meara, dated November 23, 1956, but not recorded in public records until December 26, 1956.[16]

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[13] We contend that the escrow agreement was a modification or amendment of the sublease because it provided a different method of paying rent (royalty), during pendency of the litigation, from the method provided in the original lease. The Court of Appeals held (erroneously, we believe) that it is unnecessary to decide this point. See 17 C.J.S. Contracts Sec. 379, page 869.

[14] We contend that this acquisition by O'Meara perfected McDonald's title because it vested all of the rights of McDonald's sole adverse claimant (Tidewater Oil Company) in McDonald's co-plaintiff and sublessee, O'Meara, who could not assert same against McDonald for three reasons, viz: (1) Judicial Estoppel, (2) Estoppel of lessee to dispute lessor's title, and (3) Purchase of litigious right under Louisiana law.

[15] Tr. pp. 354-356.

[16] Tr. pp. 356-358.

O'Meara did not disclose to his sublessor and co-plaintiff, McDonald, the fact that O'Meara had acquired all of the leasehold rights of their mutual adverse claimant,[17] although various letters were exchanged between them concerning the litigation and escrow agreement,[18] and McDonald had no knowledge of this acquisition.

Meanwhile O'Meara continued to make monthly deposits of McDonald's royalty in the escrow account up to January 23, 1956, after which date he continued to produce and sell oil from the property but failed to make any further deposits in escrow notwithstanding McDonald's written demand.[19]

McDonald finally learned of O'Meara's acquisition of the Broussard-Tidewater lease in the latter part of March, 1956. Whereupon, he promptly filed a rule against O'Meara [20] in the *Duspit-Broussard* suit on March 28, 1956, and obtained a court order on April 2, 1956 [21] directing O'Meara to show cause why McDonald should not be declared the owner of said Tidewater lease upon his reimbursing O'Meara the full purchase price of same plus interest, on the grounds that O'Meara had purchased

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[17] Tr. pp. 239-243 contains a long letter written on January 16, 1957 by O'Meara's general counsel to McDonald concerning their respective rights under the escrow agreement. The whole tenor of this letter shows an intent to conceal and not reveal O'Meara's acquisition of the adverse Tidewater lease, and although it offers McDonald an opportunity to take his royalty oil (rent) in kind, it expressly stipulates that the proceeds of same **shall still be deposited in escrow.**

[18] Tr. pp. 386-388 contains a letter written on February 15, 1957 by O'Meara's general counsel to McDonald's attorney enclosing a division order, addressed to the Texas Company and requesting that McDonald sign same. This letter plainly stated that the Texas Company would retain McDonald's royalty **in suspense** which means in parlance of the oil business that the Texas Company would buy the oil but would retain the purchase price in its own hands and would not pay same to McDonald, nor deposit same in escrow. This letter failed to mention O'Meara's acquisition of the Tidewater lease, of which McDonald and his attorney had no knowledge at the time.

[19] Tr. pp. 17-18 and pp. 61-65.

[20] Tr. pp. 358-370.

[21] Tr. pp. 370-372.

a litigious right adversely to McDonald.[22] The court also issued a Writ of Subpoena Duces Tecum[23] ordering O'Meara to produce any cancelled check or other document in his possession which might show the price paid by O'Meara for this lease,[24] so that the amount to be refunded to O'Meara by McDonald might be ascertained.[25]

This judgment in rule sought by McDonald did not jeopardize the rights of O'Meara under his sublease from McDonald. On the contrary, the judgment sought would have judicially perfected McDonald's title on the public records,[26] thereby automatically perfecting the rights of McDonald's sublessee, O'Meara.[27] Nevertheless, O'Meara opposed[28] McDonald's rule to acquire the Tidewater-Broussard lease by filing and urging an exception of

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[22] Under the Louisiana Civil Code of 1870, Articles 2652 and 2653 and numerous cases cited in 13 Tulane Law Review 448 (1939), any property, right, credit or chose in action of any kind may become a litigious right. A right is said to be litigious when it is the subject of a pending lawsuit which has been put at issue either by the filing of an answer or a peremptory excepton, such as an exception of no right or cause which was filed by all defendants in the *Daspit-Broussard* suit prior to O'Meara's acquisition. The party against whom a litigious right has been purchased may acquire such litigious right from the purchaser by reimbursing him the amount of the purchase price plus interest.

[23] Tr. pp. 370-371.

[24] O'Meara's acquisition recited a consideration of Ten Dollars and "other valuable considerations". McDonald deposited the ten dollars in the registry of the court at the time of filing the rule, plus an additional fifty cents to cover interest.

[25] O'Meara's acquisition was recorded in the public records on December 26, 1956. McDonald filed his rule three months later, but approximately ten days after he learned of the transaction.

[26] By this acquisition McDonald would hold lease from both groups of land claimants, so that no matter whose land title prevailed, McDonald would be the lessee and O'Meara, in turn, would be McDonald's sublessee.

[27] Under the doctrine of "after acquired property", all titles acquired by McDonald must also enure to the benefit of his sublessee, O'Meara.

[28] We can think of no plausible reason for this opposition aside from a desire to harrass and delay McDonald in the collection of his rental, unless it be that O'Meara hoped that if the Broussard title prevailed, he might be able to assert this lease against his lessor, McDonald, and avoid payment of past, accrued rentals as well as future rentals, or, at least might be able to force McDonald to make substantial concessions by way of compromise.

No cause of Action [29] thereto and by refusing to respond to the Writ of Subpoena Duces Tecum.[30]

McDonald thereupon filed this suit [31] against O'Meara in state court on April 25, 1957, to cancel O'Meara sublease [32] for non-payment of rentals. The theory of McDonald's case is:

> I. O'Meara's acquisition of the Broussard-Tidewater lease on November 23, 1956, perfected McDonald's title as of that date and entitled McDonald to immediate payment of his rentals, because it eliminated McDonald's sole adverse claimant, Tidewater Oil Company, and vested all of Tidewater's claims in McDonald's co-plaintiff and sublessee, O'Meara, who could not urge same against McDonald, because:

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[29] Tr. p. 373. This exception states no reason why McDonald's petition in rule to acquire a litigious right (Tr. pp. 358-370) does not state a cause of action. Neither O'Meara's counsel, nor the court below have suggested any such reason and we can think of none.

[30] This refusal was based on the frivolous grounds that service of the writ was made upon O'Meara's general counsel and not upon O'Meara personally.

[31] McDonald brought suit in the District Court for the Parish of Terrebonne, Louisiana. McDonald joined as defendants the First City National Bank of Houston and T. W. Archer, who hold mortgages secured by O'Meara's interest in the sublease. Louisiana Land and Exploration Company which holds a one-thirtysecond overriding royalty from O'Meara, was also named as defendant. Suit was removed to the United States District Court for the Eastern District of Louisiana, on the grounds of Diversity of Citizenship. (Tr. pp. 2-6; pp. 65-68; pp. 20-22)

[32] There was no other adequate remedy. McDonald had failed in his effort to peacefully acquire the Tidewater lease from O'Meara without opposition to the rule by O'Meara, which would have permanently terminated the litigation insofar as leasehold rights were concerned, with equitable results to both parties, i. e. no matter which landowners prevailed, O'Meara would have remained in possession paying 1/8 royalty to the prevailing landowners and paying 1/8 overriding royalty to McDonald in accordance with his sublease. Because of O'Meara's opposition, McDonald now faced protracted litigation in his rule to acquire the Tidewater lease. His rent had been withheld from him for 16 months, and in order to obtain same he found himself in the anomalous position of having to conduct the *Daspit-Broussard* suit as a co-plaintiff with his sublessee, O'Meara, contradictorily with this same O'Meara who, as assignee of Tidewater, was now the sole adverse leasehold claimant. Meanwhile, he was confronted with a hostile sublessee in possession (O'Meara) reaping the fruits and revenues of such possession, but doing all within his power to prevent McDonald from collecting his rent, notwithstanding the fact that no one was then claiming, or could possibly claim said rent (royalty) other than O'Meara himself.

(1) O'Meara, being a lessee in possession, could not dispute the title of his lessor, McDonald.

(2) O'Meara, having joined as co-plaintiff with McDonald in the *Daspit-Broussard* suit, was judicially estopped from acquiring and asserting the rights of their adverse claimant, Tidewater, against McDonald.

(3) O'Meara, having purchased a litigious right, which McDonald was entitled to acquire from O'Meara, could not assert same against McDonald.

II. In the alternative, the Escrow Agreement modified and amended the sublease, and O'Meara's failure to deposit monthly rentals in the bank, as required by the escrow agreement, amounted to a failure to pay rent under the sublease.

In Paragraph 5 of his petition (Tr. p. 24) plaintiff pleaded the entire record in the *Daspit-Broussard* suit, making same a part of his petition by reference, to show O'Meara's purchase of the Tidewater lease, the Judicial Estoppel, the Estoppel of Lessee, and the purchase of litigious right, which are relied upon as the first grounds of cancellation above stated. Material parts of this suit record are either in the transcript and/or shown by McDonald's affidavit (Tr. pp. 310-313).

No trial on the merits was had. In a very brief opinion[33] the district court found no genuine issue as to any material fact. It granted defendants' motions for a summary judgment and dismissed the suit as to all defendants. The Court of Appeals affirmed this judgment.[34]

[33] Appendix A.
[34] Appendix B. 259 F. 2d 425. (5th Cir. 1958)

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A.

Genuine Issues of Material Facts

The rule is well established that a summary judgment should not be rendered in favor of a defendant if there is a genuine issue as to any material fact; and where there is any possibility that the plaintiff might prevail.[35] *Barron and Holtzoff*, Vol. 3, Sec. 1234 at pages 75, 76 states:

> " * * * A movant is not entitled to summary judgment unless the facts conceded show a right to judgment **with such clarity as to lease no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.** The court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried. **That it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him.** * * *" (Emphasis ours)

The above interpretation of Federal Rules of Civil Procedure rule 56(c), 28 U.S.C. has been consistently followed.

The Court of Appeals passed upon the above stated alternative grounds for cancellation of lease first, but in stating this alternative question to be decided, the Court fell into **serious error of material facts** in the first paragraph of its opinion when it said:

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[35] *Whitaker v. Coleman*, 155 F. 2d. 305 (5th Cir. 1940); *Hawkins v. Frick-Reid Supply Corp.*, 154 F. 2d 88 (5th Cir., 1946); *Chappell v. Goltzman*, 186 F. 2d 215 (5th Cir. 1950); *Gray Tool Co. v. Humble Oil & Ref. Co.*, 186 F. 2d 365 (5th Cir. 1951); *Heyward et al, v. Public Housing Admn.*, 238 F. 2d 689 (5th Cir. 1956).

"The narrow question to be decided is whether O'Meara's delivery of oil to the Texas Company by pipeline, ***to be credited to McDonald's account,*** *was payment to McDonald in accordance with the agreement between the parties."* (Our emphasis)

In its above statement of the question to be decided the Court of Appeals resolves an **important material fact** adversely to McDonald [36] because the oil was delivered to the Texas Company by O'Meara **not to be credited to McDonald's account,** but to be placed in a **suspense account** [37] beyond McDonald's reach at a time (January 23, 1957 to April 25, 1957) [38] when no person was claiming same adversely to McDonald **other than O'Meara himself.**

That oil was delivered to the Texas Company on and after January 23, 1957 **not to be credited to McDonald's account,** but to be placed in a **suspense account** beyond McDonald's reach, is clearly shown from the previously mentioned letter [39] which O'Meara's general counsel wrote to McDonald's attorney on February 15, 1957 [40] and from which we quote in the foot-note below.[41]

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[36] As will be noted from this application for writs the question is much broader. Further, all important issues of fact are contradictory, and we submit could not possibly be determined upon this incomplete record. This type of procedure we think was never contemplated by this Honorable Court in its desire to do justice between the parties by trial.

[37] See note 18 *supra* re this suspense account.

[38] January 23, 1957 was the date when O'Meara ceased making escrow deposits; April 25, 1957 was date of filing suit.

[39] See note 18 *supra*.

[40] Tr. pp. 386-388.

[41] "Enclosed please find Division Orders from The Texas Company. As you know, **The Texas Pipe Line Company** tied into Timbalier Island on January 23, 1957, and is now taking the Daspit lease oil directly from the property. **The Texas Company has informed me that they will hold the proceeds as a stake-holder pending final disposition of the litigation.** This of course, accomplishes the same result as escrowing the funds in the bank.

It is suggested that you have all of your clients, **including McDonald,** execute the Division Orders so that The Texas Company will place the correct amounts **in suspense** for each of the royalty owners. It is

(Continued)

In considering whether any person was claiming, or could possibly claim McDonald's overriding royalty, other than O'Meara himself, it must be born in mind that under his sublease [42] from McDonald, O'Meara was obligated to pay one-eighth (1/8) royalty to the Daspits (landowners) and also oligated to pay a one-eighth (1/8) overriding royalty to his sub-lessor, McDonald, thereby leaving O'Meara a net of six-eighths (6/8) for himself. On the other hand, when Tidewater Oil Company sold its leasehold rights to O'Meara,[43] it reserved nothing so that if the Broussard-Tidewater lease prevailed over the Daspit-McDonald lease, and if O'Meara could operate thereunder, he would pay the Broussards (landowners) one-eighth (1/8) royalty and would retain a net of seven-eighths (7/8) for himself. The difference between this net (7/8) and the net (6/8) retained by O'Meara his sublease from McDonald is one-eighth (1/8). This difference represents McDonald's overriding royalty, and is the reason why no one, other than O'Meara himself, was claiming adversely to McDonald. That no person other than O'Meara, was claiming, or could possibly claim same is undeniably and conclusively shown by the following admitted facts:

(1) **Tidewater Oil Company was not claiming,** and could not possibly claim any interest because it had previously conveyed all its in-

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[41] (Continued)
understood, of course, that **Mr. Robert W. O'Meara will be relieved of all of his obligations under the terms of** our Escrow Agreement from January 23, 1957, forward, but that the **Escrow Agreement shall remain in full force and effect as to those monies collected and deposited prior to that date.** Proceeds for the January runs have not yet been received. It is expected that Robert W. O'Meara will receive oil payments through January 22, 1957 and that the balance will be **retained in suspense by The Texas Company.** Upon receipt of any proceeds for the January runs we will deposit the correct proportionate amounts in escrow as per our agreement." (Emphasis ours)

[42] Tr. pp. 51-57.

[43] Notes 15 and 16 *infra*. The fact that the Broussard-Tidewater lease provided for the customary one-eighth (1/8) landowners' royalty is shown at Tr. p. 310.

terest to O'Meara.

(2) **The Broussards were not claiming,** and could not possibly claim any interest in McDonald's one-eighth overriding royalty. They were claiming a distinct and separate one-eighth royalty as **landowners and lessors** under the Broussard-Tidewater lease contradictorily with the Daspits who were claiming the same one-eighth royalty as landowners and lessors under the Daspit-McDonald lease.

(3) **The Daspits were not claiming,** and could not possibly claim McDonald's one-eighth overriding royalty. The one-eighth landowners royalty, claimed by both the Daspits and the Broussards, was distinct and separate from McDonald's overriding royalty, and was deposited in a separate escrow account in Citizens Bank at Houma by O'Meara under a separate escrow agreement to which McDonald was not a party because he had no interest therein.

From the foregoing it is clear that in stating the alternative question to be decided, the Court of Appeals resolved one material fact [44] adversely to McDonald and overlooked another.[45] In passing upon defandant's (O'Meara's) Motion for Summary Judgment, and in order to determine whether these facts are material both of them **must be resolved in favor of the plaintiff, McDonald,** and, accordingly, the alternative question to be decided must be stated as follows: [46]

"The question to be decided is whether O'Meara's

[44] Whether McDonald's royalty oil was delivered to the Texas Company by O'Meara to be **credited** to McDonald's account, or to be placed in **a suspense** account beyond McDonald's reach.

[45] Whether any person, other than O'Meara himself, was claiming, or could possibly claim McDonald's royalty oil adversely to McDonald.

[46] The reasons why the question here posed must be answered in the negative, are stated hereafter under B of paragraph VI. of this petition for writ.

> delivery of McDonald's royalty oil to The Texas Company, **to be placed in a suspense account**, was payment to McDonald **in accordance with the agreement** of the parties, even though **no person was then claiming** or could possibly claim said oil adversely to McDonald **other than O'Meara himself.**"

It is pertinent to note that **not even O'Meara himself** could have successfully claimed McDonald's overriding royalty **even if the Broussard land title had prevailed over the Daspit title,** because of any one of three separate reasons, viz: (1) **Judicial Estoppel**[47] (2) **Purchase of Litigious Right by O'Meara**[48] and (3) **Estoppel of Lessee from Disputing Lessor's Title.**[49]

In the fourth paragraph of the opinion,[50] the Court of Appeals resolved **three material questions of fact** adversely to McDonald's contentions when it said:

> "*The Texas Company prepared a division order* ***recognizing*** *McDonald's interest. McDonald has*

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[47] This point was urged below. O'Meara's brief made no reply thereto, and the opinion of the Court of Appeals makes no mention thereof. The estoppel is based on the fact that O'Meara joined as a co-plaintiff with McDonald in the *Daspit-Broussard* suit claiming the leasehold rights contradictorily with Tidewater Oil Company which was adversely claiming leasehold rights on the same property under the Broussard-Tidewater lease. (Tr. pp. 318-333; Tr. pp. 350-353; Note 9 *supra*) The Broussards were claiming a prescriptive title by adverse possession of more than thirty years. McDonald's attorneys and O'Meara's attorneys collaborated in preparation of this case, and on two occasions visited the land with witnesses who had knowledge of the nature, extent and duration of the Broussards' possession, and subsequently collaborated in taking the testimony of these witnesses by deposition. O'Meara was therefore estopped from acquiring the title of Tidewater and asserting it against his co-plaintiff, McDonald. The *Daspit-Broussard* suit was pending in court at all material times up to, and beyond the date when the present suit was filed.

[48] This point was urged below. O'Meara's brief made no reply thereto, and the opinion of the Court of Appeals makes no mention thereof. The facts and law to support it have been previously stated. See foot-notes 20 to 30 *supra*.

[49] This point was rejected by the Court of Appeals for reasons which we believe erroneous. We cover this point under B of paragraph VI. of this petition for writ.

[50] Appendix B.

> ***refused** to execute this division order and has **allowed** his share of the oil proceeds to remain with the Texas Company."*

Obviously, if (1) the Texas Company **recognized** McDonald's interest and was **prepared to pay** him, and if (2) he **refused, without any good reason** to sign the division order as a condition precedent to immediate payment, and (3) capriciously **allowed** his share of the oil proceeds to remain with the Texas Company, then there would be some equities in O'Meara's favor.

However, as shown by the letter of O'Meara's counsel (Note 41 *supra*) (1) The Texas Company did **not** recognize his interest, but held same in **suspense,** (2) he had **good reason for refusing** to sign this division order[51] (3) he did not **allow** but was **compelled** to permit his share of the oil to remain with The Texas Company, notwithstanding his vigorous protests by repeated written

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[51] The division order was on a Texas Company printed form identical to the one shown at Tr. pp. 383-386, which McDonald had previously signed simultaneously with the execution of the escrow agreement as part thereof. It was a letter addressed to the Texas Company declaring the extent of McDonald's interest to be one-eighth (1/8), authorizing the Texas Company to purchase same and remit the purchase price to McDonald monthly, but containing the further declaration that **if there was any adverse claimant the Texas Company was authorized to retain said purchase price in its own hands, without interest thereon, until such time as McDonald furnished indemnity satisfactory to the Texas Company.** In requesting McDonald's signature (note 41 *supra*) stating that McDonald's portion would, in fact, **"be retained in suspense by the Texas Company"** as a **"stakeholder pending final disposition of the litigation"** it was the duty of O'Meara's counsel to disclose to his sublessor and co-plaintiff the fact that **O'Meara himself** was the sole **adverse litigant** to McDonald in said **pending litigation** and, was also the **adverse claimant** referred to in the division order. A failure to speak when one has the duty to do so, amounts to **concealment. The Court of Appeals** held (erroneously, we submit) that constructive notice by recordation in the public records was sufficient. The Court stated that six months elapsed between recordation and filing of suit. Actually only **three months** elapsed between recordation and the filing of McDonald's rule to acquire the Tidewater lease (notes 20, 21 and 22 *supra*). The outcome of this case does not depend upon concealment, vel non by O'Meara, but the issue is material to show his **bad faith** in retarding his lessor's collection of rental in the hope that he might subsequently enrich himself to the extent of said rental at the expense of his lessor.

demands and by court action (Tr. pp. 358-372) in his attempt to acquire the litigious right (Tidewater lease) from O'Meara by refunding the purchase price plus interest, which would have perfected, on the public records, **both McDonald's title** and **O'Meara's sublease,** thereby enabling McDonald to immediately collect **not only** his royalty from The Texas Company **but also** the rent which had accumulated in the escrow account for more than a year. On April 15, 1957 only **ten days** before the filing of this suit, O'Meara's general counsel personally appeared in open court, actively opposing McDonald's effort to acquire the Tidewater lease (Tr. p. 313) by filing an exception of "No Cause or Right of Action" thereto (Tr. p. 373) and refusing to respond to the Writ of Subpoena Duces Tecum (Tr. pp. 370-372) on the grounds that same had been served upon him as Counsel (Tr. p. 312) instead of being served personally on O'Meara who was a non-resident and could not be found. In the presence of O'Meara's general counsel in open court on April 15, 1957, the Court fixed these matters for trial on **May 14, 1957** (Tr. p. 313). Thereafter, while same was pending for trial, McDonald filed the present suit to cancel the sublease on April 25, 1957.

It is quite clear from the above that at the time of **filing suit,** which is the **only material time:**

(1) McDonald's refusal to sign the Division Order was **not** the reason why he could not get his money from The Texas Company.

(2) The Texas Company did **not** recognize McDonald's interest; It merely recognized the **fact** that McDonald **claimed** an interest which was being **adversely claimed** by O'Meara, as assignee of Tidewater. It therefore held the funds in suspense until the Court could determine the true ownership as between Mc-

Donald and **O'Meara,** who were the sole claimants to same.

(3) McDonald did not **allow** but was **compelled** to permit his money to remain with The Texas Company at all **material times** up to and **beyond** the date of filing suit.

It was not until the Court rendered judgment in the *Daspit-Broussard* suit on **May 22, 1957** (Tr. p. 313) decreeing the Broussard-Tidewater lease, then owned by O'Meara, to be a nullity and ordering same cancelled from the public records, that **The Texas Company** and **O'Meara** recognized McDonald's interest, for the first time, and indicated a willingness to **pay** McDonald. This was **one month after** the present suit had been filed. An offer to pay rent comes too late after suit has been filed to cancel same for nonpayment.

The Court of Appeals erroneously resolves other material disputes of fact adversely to McDonald when it says:[32] (Our emphasis)

> "From the completion of the first well, December 7, 1955, until January 23, 1957, **because there was no pipeline** connection at Timbalier Island, O'Meara barged the oil, selling at **point of barge delivery.** * * *. In the meantime, **Texas Company** constructed a pipe line to Timbalier Island, attaching it to O'Meara's wells January 23, 1957. After that date O'Meara made no further deposits to the escrow agent, since all of the oil produced **was delivered to the Texas Company.**"

It is clear that the Court is under the erroneous impression that O'Meara was acting in good faith and that he made no deposits in escrow after January 23, 1957

[32] See paragraph 4 of the opinion of the United States Court of Appeals for the Fifth Circuit. Appendix [illegible].

because, through no fault of his own, he was unable to collect McDonald's portion from The Texas Company, notwithstanding a reasonable effort to do so. As shown by the above quotation the Court erroneously considered the following to be admitted facts of the case:

1. Prior to January 23, 1957, O'Meara barged the oil from the island and sold and delivered same to persons **other than The Texas Company.**
2. **No** oil was sold or delivered to The Texas Company **prior to January 23, 1957.**
3. On January 23, 1957, **The Texas Company** constructed a pipeline.
4. On January 23, 1957, **The Texas Company** for the **first time** began to receive and purchase this oil.

None of the above four statements are correct. The accurate facts concerning same are:

1. Prior to January 23, 1957, all oil was barged from the island by Cenac Towing Co. Inc., a common carrier, which delivered same to **Texas Pipeline Company,** another common carrier, which, in turn delivered same to **The Texas Company,** which was the purchaser.
2. **All** oil was sold and delivered to The Texas Company **prior to January 23, 1957,** with the possible exception of a few clandestine sales which might have been made to **Timbalier Pipeline Co. Inc.,** a dummy corporation organized by O'Meara, and hereafter discussed.
3. On January 23, 1957, the common carrier, **Texas Pipeline Company** constructed a pipeline, which eliminated the services of the previous intervening common carrier, Cenac Towing Co. Inc.
4. On January 23, 1957, **The Texas Company** con-

tinued to receive and puchase the oil just **as it had done before,** except that the services of the barge line common carrier were no longer needed.

5. O'Meara's general counsel cleverly refrained from naming any purchaser prior to January 23, 1957, since there was none other than The Texas Company. He contented himself with the vague statement that The Texas Company became on that date "a new first purchaser", which we explain hereafter.

As shown by McDonald's affidavit (Tr. p. 314) at the time of first production (January 1, 1956) O'Meara organized a dummy corporation, **Timbalier Pipeline Company, Inc.** which he owned and controlled and which had no assets subject to execution. O'Meara proposed to sell the oil to this dummy corporation which would, in turn, sell same to the Texas Company and collect the proceeds. McDonald objected because he did not wish to be left with a claim against a dummy corporation, if he won the pending lawsuit.

If any oil was sold to any party, other than The Texas Company, prior to January 23, 1957, same necessarily sold to this dummy corporation, and was entirely a **simulated** or **"paper transaction",** because all oil was delivered to The Texas Company via the two common carriers mentioned, and was paid by The Texas Company.

In his letter of February 15, 1957 (Note 41 *supra*) O'Meara's counsel admits that the **Texas Pipeline Company** constructed the pipeline, and virtually admits that oil was purchased by The Texas Company during the entire month of January when he says: (Our emphasis)

> *"Proceeds for the January runs have not yet been received. It is expected that Robert W. O'Meara will receive oil payments through January 22, 1957 and that the* ***balance*** *will be retained in suspense by The Texas Company."*

As indicated in the above letter, The Texas Company paid for oil purchased prior to January 23, 1957, but retained the **balance** in suspense.

Under the escrow agreement (Tr. pp. 54-61) and the Division Order annexed thereto (Tr. 386-388), O'Meara obligated himself to **purchase** McDonald's oil and deposit the proceeds in escrow. Therefore **insofar as McDonald was concerned,** O'Meara was the **first purchaser.** In the escrow agreement, McDonald ratified the sale (by O'Meara) to the "present purchaser" (from O'Meara) which was The Texas Company, being also the "second purchaser" since O'Meara himself was the "first purchaser" of McDonald's oil, under the provisions of the escrow agreement and division order annexed thereto.

When O'Meara elected to abrogate the escrow agreement and cease to function thereunder, then, **under his theory of the case,** he ceased to be the "first purchaser" of McDonald's oil, and The Texas Company, which had been continuously buying the oil from O'Meara and **paying for same,** thereupon became a "new first purchaser" of McDonald's oil. Counsel's theory is untenable, but it served its purpose in that the Court erroneously found a fact that some person (name unknown) **other than The Texas Company** bought the oil and paid for it **prior** to January 23, 1957.

The Court of Appeals also resolved material disputed facts adversely to McDonald when it said:

"There is no doubt that delivery to a ***pipe line purchaser*** *is the usual and preferred method of marketing oil. It is undisputed that all of the oil produced after January 23, 1957 was delivered to The Texas Company".*

There was no **pipe line purchaser.** The pipe line was owned by **Texas Pipeline Company,** a common carrier which does not purchase oil. It is a separate corporation from The Texas Company. Nor can we agree with the Court's observation that "delivery to a **pipe line purchaser** is the **usual** and **preferred** method of marketing oil. Such method of marketing exists only in rare case where some major company builds its own private pipe line and becomes a "pipe line purchaser". The **preferred** and **mandatory** method of marketing is to do so strictly in the manner provided by the lease, which provided for delivery to "**Lessor's credit** in any pipe line connected therewith". If oil had been delivered to McDonald's **credit** in the pipe line, as required by the lease, said common carrier pipeline company would have transported same, via connecting carriers if necessary, to any purchaser or consignee designated by McDonald, and such purchaser or consignee would have **paid** McDonald for same.

In concluding this part we submit that the Court resolved adversely to McDonald all of the material disputed questions of fact stated below under footnotes 53 to 64 inclusive:

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[53] Whether McDonald's royalty oil was delivered to The Texas Company by O'Meara to be credited to McDonald's account, or to be placed in a **suspense account** beyond McDonald's reach.

[54] Whether any person, other than O'Meara himself, was claiming or could possibly claim McDonald's royalty oil adversely to McDonald.

[55] Whether The Texas Company recognized McDonald's interest, or whether it merely recognized the fact that McDonald claimed an interest which was also being adversely claimed by O'Meara.

[56] Whether The Texas Company would have paid McDonald, at

(Continued)

If any material fact exists, as to which there is no evidence in the record either pro or con, same should be resolved adversely to O'Meara, because:

(1) A motion for summary judgment should not be granted, unless the facts conceded show affirmatively that the adverse party cannot prevail under any circumstances.

(2) O'Meara relies on a Plea of Payment which is a special defense. The party pleading payment has the burden of proving all facts necessary to constitute payment.

B.

Estoppel of Lessee from Disputing Lessor's Title

In determining rights under a mineral lease on land in Louisiana, where jurisdiction is based on diversity of citizenship, Federal Courts are bound by the latest expression of the Louisiana Supreme Court.[65] It is well settled that in construing mineral leases, the provisions of the Louisiana Civil Code relative to ordinary leased must be applied;[66] and that as against his sublessee, a

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[56] (Continued)
any time prior to the filing of this suit, if McDonald had signed a division order.

[57] Whether McDonald voluntarily allowed his share of the oil proceeds to remain with The Texas Company, or whether he was compelled to permit same to remain there.

[58] Whether The Texas Company built the pipeline in question.

[59] Whether Texas Pipeline Company, a common carrier, built the pipeline.

[60] Whether Texas Pipeline Company purchased any oil.

[61] Whether The Texas Company was a "pipeline purchaser".

[62] Whether any oil was delivered to "McDonald's credit in a pipeline" as required by the lease.

[63] Whether after O'Meara's acquisition of the Tidewater lease on November 23, 1956, it was still necessary for O'Meara to deposit McDonald's royalty in escrow for the purpose of protecting himself, instead of paying same directly to McDonald, and, if so, against whom did O'Meara need such protection.

[64] Whether O'Meara made in good faith, reasonable effort to obtain the proceeds of McDonald's royalty from and after January 28, 1957, in order that same might be deposited in escrow and/or delivered to McDonald.

[65] *Sabine Lumber Co. v. Broderick*, 88 F. 2d 586 (5th Cir. 1937).

[66] *Milling v. Collector of Revenue*, 22 La. 751; 57 So. 2d 673, 681. *Melancon v. Texas Company*, 230 La. 593; 89 So. 2d 135, 142 (1956).

sublessor has all the rights of a lessor.[67] It is the rule in Louisiana, as elsewhere that a tenant in possession cannot dispute his landlord's title.[68]

O'Meara took possession of the property as sublessee of McDonald and remained in continuous possession in such capacity at all material times, enjoying the fruits and benefits of his occupancy.[69] He was therefore estopped from asserting the subsequently acquired Tidewater lease adversely to McDonald as long as he remained in possession as McDonald's lessee. He could not change the character of his possession, could not refuse to pay rent, and could not claim adversely to McDonald unless and until (1) he notified McDonald that he was relinquishing all of his rights under the sublease and (2) vacated the leased premises and surrendered possession thereof to McDonald. Since he did neither of these things, McDonald was entitled to receive immediate payment of monthly rentals as long as O'Meara remained in possession because there was no adverse claimant other than O'Meara, himself, who was estopped from claiming.

In deciding this point adversely to McDonald, the Court of Appeals relied upon the following, which we quote from the lease:

1. *"Lessee shall have the right to purchase a lease or leases from others to* **protect** *its leasehold rights and shall not thereby be held to have disputed Lessor's title;*

2. *and, in the event Lessor's title or interest*

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[67] *Weir v. Grob*, 215 La. 967; 41 So. 2d 846 (1949).

[68] *Sabine Lumber Co. v. Broderick, Supra* note 65; *Town of Morgan City v. Dalton*, 112 La. 9, 36 So. 208 (1904); *Ideal Savings & Homestead Ass'n. v. Gould, et al*, 163 La. 442, 451; 112 So. 40 (1927); *Federal Land Bank of N. O. v. Spencer*, 160 So. 175 (La. App. 1935); *State ex rel. Winn v. Sinclair Ref. Co. et al.*, 25 So. 2d 543 (La. App. 1946).

[69] O'Meara's portion of the proceeds were not escrowed, nor held in suspense, but were paid to him by The Texas Company, continuously from date of first runs up to date of filing suit.

therein is claimed by **others** *Lessee shall have the right to withhold payment of royalties or deposit such royalties in the registry of the Court until final determination of Lessor's rights.*" (Our emphasis)

Clause No. 1 quoted above gave O'Meara the right to purchase the Broussard-Tidewater lease for the limited purpose of **protecting** himself from the adverse claimant, Tidewater Oil Company. It gave him no right to assert said lease adversely to McDonald or to refuse to pay rentals to McDonald as long as he remained in possession as McDonald's tenant. This is made quite clear by clause No. 2 which says that if lessor's title "is claimed by **others** lessee shall have the right to withhold payment of royalties". The word **others**" clearly means persons **other than O'Meara.** Upon O'Meara's purchase of the Tidewater lease, McDonald's royalty was no longer being claimed by **others,** and O'Meara no longer had the right to withhold payment from McDonald.

In further support of its ruling on this point, the Court of Appeals said:

At the time of O'Meara's purchase of the Tidewater lease the Daspit-Broussard action was still pending. O'Meara had put himself in the position of protecting his leasehold, but there was uncertainty as to which lease was valid. He was justified therefore in continuing to make deposits as provided in the escrow agreement."

We concede that (1) the Daspit-Broussard was still pending, (2) O'Meara had a right to buy the Tidewater lease to protect his leasehold, and (3) there was uncertainty as to which lease was valid as long as Tidewater owned the lease. However, as between McDonald and O'Meara, all three of these points became moot at the

moment when O'Meara bought the lease because (1) the need for protection disappeared with the disappearance of McDonald's sole adverse claimant (Tidewater) (2) O'Meara could no longer withhold payment on the grounds that McDonald's interest was being claimed by **others**, and (3) the uncertainty as to which lease was valid became immaterial because O'Meara, as tenant in possession, could not assert the Tidewater lease against McDonald and was obligated to pay monthly rentals until such time as he surrendered to his lessor **both his lease and his possession.**

This obligation to pay, and failure to pay monthly rentals was **not limited to the period when funds were being deposited in escrow** (as inferred by the court in the above quoted paragraph) **but extended** from date of O'Meara's acquisition on November 23, 1956 **up to and beyond the date of filing suit,** April 25, 1957.

We submit that the judgment of the Court of Appeals overruling this Plea of Estoppel is an erroneous interpretation of the lease, and that it places a premium on the bad faith of a lessee in possession who, having been granted the right to acquire an adverse lease as **a shield to protect** himself, uses it instead as a **sword to attack** his lessor in an attempt to avoid payment of rent and **unjustly enriches himself** at the expense of his lessor. Under his sublease from McDonald, O'Meara was obligated to pay one-eighth (1/8) royalty to the landowners (lessors) and an additional one-eighth (1/8) overriding royalty to his sublessor, McDonald, leaving a net of **six-eighths (6/8)** to O'Meara. Whereas, under the Broussard-Tidewater lease, he was obligated to pay **one-eighth (1/8)** royalty to the landowners (lessors), and retained a net of **seven-eighths (7/8)** for himself. He thus stood to profit to the extent of one-eighth (1/8) if under the

guise of "protection" he could assert the Tidewater lease against his lessor, McDonald, and at the same time remain in continuous possession under his lease from McDonald.

The Escrow Agreement authorized the bank to deliver the escrowed funds to McDonald **"if the party or parties claiming adversely to McDonald abandoned their claims."** Upon O'Meara's acquisition of the Tidewater lease the "abandonment" or termination of the adverse claim occurred by operation of law, since O'Meara could not assert same against McDonald.

In concluding this part, we submit that in keeping with all principals of fair dealing and honesty, and in keeping with the stringent laws of Louisiana relative to the payment of royalty, O'Meara should have begun to make monthly payments to McDonald as of November 23, 1956, and should have notified the bank as escrow to deliver the accumulated back rent to McDonald. His failure to do so, and his failure to notify McDonald, aggravated by his active efforts to prevent McDonald from collecting rent, amount to a failure to pay rent under the contract and the laws of Louisiana.

C.

Judicial Estoppel

The Daspits, as landowners, filed the *Daspit-Broussard* suit against the Broussards, adverse land claimants, and against Tidewater Associated Oil Company (now Tidewater Oil Company), mineral lessee of the Broussards (Tr. pp. 318-337). McDonald joined as a party plaintiff with the Daspits (Tr. pp. 338-349). The Court ordered that O'Meara be made a party to the suit. (Tr. pp. 349-350). O'Meara thereupon filed an answer join-

ing as a co-plaintiff with McDonald asserting the validity of the Daspit's title, the Daspit-McDonald lease, and the McDonald-O'Meara sublease adversely to Tidewater Oil Company, which was a defendant in the case (Tr. pp. 350-354). The Broussards and Tidewater Oil Company put the case at issue by filing exceptions of no right or cause of action and other exceptions. The Broussards claimed possession for a period of many years.

O'Meara's general counsel collaborated with McDonald's attorney in the preparation of this case, visiting the island together by boat with witnesses to examine the property in an effort to determine the nature, extent, and duration of the Broussards possession, and subsequently collaborated in taking the testimony of these witnesses by deposition in August 1956 in connection with the preparation for the trial of said case.

Approximately four months later, on November 23, 1956, while the case was still pending, O'Meara purchased the Broussard-Tidewater lease, thereby acquiring all of the rights of McDonald's sole adverse litigant in the case.

It is clear that O'Meara was judicially estopped from asserting the rights of Tidewater adversely to his co-plaintiff, McDonald. As a general rule, a party pleading estoppel must show that he relied upon same or acted to his prejudice. However, it is well settled that judicial estoppel is an exception to this rule. The party is bound by his solemn judicial declarations formally made in pleadings filed in Court. After joining as co-plaintiff asserting the validity of the Daspit-McDonald lease, under which he held as sublessee of McDonald, O'Meara will not be permitted to reverse his position and assert the title of the adverse litigant (Tidewater) which he subsequently acquired.

D.

Did O'Meara's delivery of oil to The Texas Company, via a common carrier pipeline company, to be held in suspense by The Texas Company, beyond McDonald's reach, constitute payment to McDonald in accordance with the agreement of the parties, even though no person could possibly claim same adversely to McDonald other than O'Meara himself.

We quote the pertinent portions of the lease which were also quoted by the Court of Appeals.[70] Same provides only **three possible methods** of payment, viz: (Our emphasis)

(1) Oil royalties shall be delivered to Lessor free of expense at Lessor's option in tanks furnished by Lessor at the well

(2) Or to **Lessor's credit** in any pipeline connected therewith.

(3) In the event Lessor does not furnish tanks for such royalty oil and no pipeline is connected with the well, Lessee may sell Lessor's royalty oil at the best market price obtainable and **pay** Lessor the price received f. o. b. the leased property, less any severance or production tax imposed thereon.

Payment was **not** made by any of the above **three possible methods** as is clearly shown by the following:

(1) PAYMENT WAS NOT MADE IN KIND: McDonald did not elect to furnish tanks to take his royalty oil in kind. O'Meara's letter of January 14, 1957[71] advised that same would **not** be delivered in kind unless McDonald agreed to **place the proceeds in escrow**

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[70] Appendix B.

[71] Tr. pp. 240-241; This letter was written 49 days after O'Meara's purchase of the Tidewater lease. It also failed to advise McDonald of said purchase.

(2) NO OIL WAS DELIVERED TO MC DONALD'S CREDIT IN ANY PIPELINE: The pipeline in question was owned and operated by **Texas Pipeline Company,** a common carrier, which is a separate corporation from The Texas Company. If oil had been delivered **to McDonald's credit** in this pipeline, **as required by the lease,** then said common carrier would have delivered same, via connecting carriers if necessary, to **any purchaser** or **consignee** designated by McDonald, and such purchaser or consignee would have paid the purchase price of same **directly** to McDonald.

(3) SELL THE OIL AND PAY LESSOR HIS PORTION: This third of three **possible** methods of payment (i. e. sell the oil and pay lessor his portion of the proceeds) is permissible, **only when the first two methods are both non-existent.** O'Meara had no right to pay, and did not, in fact, pay by this method, because, although he sold the oil, he **did not pay** his lessor.

Louisiana law, which Federal courts are obligated to follow, governs the present case.[72] As against his mineral sublessee, a mineral sublessor has all the rights of a lessor.[73] Non-payment of rent when due is peremptory grounds for the cancellation of a mineral lease.[74] Rent must be paid **strictly in accordance with the contract,** and not at the **whim** or **caprice** of lessee.[75] In the *LeRosen*[76] case and the *Clingman*[77] case the court can-

[72] *Sabine Lumber Co. v. Broderick et al,* 88 F. 2d 586 (5th Cir. 1937)

[73] *Weir v. Grab,* 215 La. 967, 41 So. 2d 846 (1949)

[74] Louisiana Civil Code of 1870, Arts. 2046, 2047, 2710, 2712, 2729; *Louisiana Oil Refining Corp. v. Cowart et al,* 163 La. 90, 111 So. 610 (1927); *Melancon v. The Texas Company,* 230 La. 593, 89 So. 2d 135 (1956); *Bollinger v. The Texas Company et al,* 232 La. 637, 95 So. 2d 132 (1957)

[75] *Melancon v. The Texas Company, supra* note 68; *Bollinger v. The Texas Company, supra* note 70.

[76] *LeRosen v. No. Centeral Texas Oil Co.,* 169 La. 973, 126 So. 442 (1930)

[77] *Clingman v. Devonian Oil Co.,* 188 La. 310, 177 So. 59 (1937)

celled mineral leases, holding that deposit of rent in a bank to the joint account of husband and wife did not constitute payment in accordance with the contract which provided for deposit in the name of husband alone. In the recent *Melancon*[78] case (1956) and the *Bollinger*[79] case (1957), the Supreme Court of Louisiana cancelled producing mineral leases for non-payment of royalty, holding that where a lease specifies no time for payment, royalties must be paid **monthly** in accordance with the **accepted custom.** In the *Bollinger* case the lessee paid monthly "shut-in gas well rentals" instead of royalties on production, and such payments exceeded the amount which lessor would have been entitled to receive as royalties on production. The Supreme Court said on pages 136, 137.[80]

> "Even though plaintiff was paid as 'shut in' royalties more than was due him as production royalties, we cannot agree that this was a satisfaction of the terms of the lease. It is only co-incidental that this situation or condition existed; it could have been the reverse. If allowed to continue, it could have had results as prevailed in the *Melancon* case, *supra*.
>
> **"A Lessee must comply with his lease terms. Whether production payments are larger or smaller than 'shut in' payments, they must be paid in accurate computations and as such. Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease, not at the whim or caprice of the defendant. Where the whim of defendant could or might affect a Lessor's rights under a lease, courts should always (as we are doing here) intervene to protect those rights.** (Emphasis by the Court.)".

The Court in the *Bollinger* case also held that royal-

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[78] *Melancon v. The Texas Company, supra* note 74.
[79] *Bollinger v. The Texas Company, supra* note 74.
[80] *Bollinger v. The Texas Company et al*, 232 La. 637, 95 So. 2d 132, 136, 137 (1957).

ties must be paid monthly if no other time is specified. The Court said on page 136.[81]

> "In the *Melancon* case, *supra*, we held that the codal provisions which apply to ordinary leases are also applicable to mineral leases; and that in the case of royalty based on gas and oil production, **it is the accepted custom to make such payments on a monthly basis computed on the amount of gas and oil sold or run into the line from the well.** We further stated that a justifiable cause might exist for delay in such payment, when there is a reasonable dispute as to those entitled to receive the royalties. In the instant case, the record discloses that there was no dispute as to those to whom royalties were due." (Emphasis ours.)

The *Melancon* and *Bollinger* cases, *supra*, are based on the Louisiana Civil Code; they follow previous jurisprudence on the subject and represent the latest expression of the Louisiana Supreme Court.

Under the rule there laid down, i. e. royalty must be paid **strictly in accordance with the contract,** not at the **whim** or **caprice** of lessee, and must be paid **monthly,**[82] it is clear that O'Meara's delivery of oil to The Texas Company, via a **common carrier pipeline company,** to be held in **suspense** by The Texas Company **beyond McDonald's reach,** did not constitute payment under the lease which provided for "delivery to **Lessor's credit** in any pipeline connected therewith," especially in view of the fact that O'Meara deliberately **neglected to notify** McDonald of his purchase of the Tidewater lease, and also obviously **neglected to notify** The Texas Company that McDonald's royalty was no longer being **claimed adversely by anyone,** and should therefore be **paid im-**

[81] *Bollinger v. The Texas Company et al.* note 80 at page 136.
[82] In the case at bar, the escrow agreement reflects the universal custom of paying royalty monthly.

mediately instead of being held in suspense.

In view of the unbending Louisiana rule requiring royalty to be monthly in strict accord with the manner provided by the contract, the holding of the Court of Appeals to the effect that delivery of McDonald's royalty oil to The Texas Company to be held in suspense beyond McDonald's reach, constituted payment in accordance with the contract, can only be accounted for by the fact that the Court resolved adversely to McDonald all of the material issues of disputed fact previously discussed. Some of said disputed facts were of the **utmost vital materiality,** while others were of secondary importance, being erroneously resolved and cited by the Court and tending to show equities, good faith and fair dealing on O'Meara's part, and capriciousness and unreasonableness on McDonald's part, when, actually, the truth was exactly the opposite.

E.

The Escrow Agreement modified and amended the Sublease, and Failure to Pay Rent in Manner Provided by the Escrow Agreement Amounted to Failure to Pay Rent under the Sublease itself.

This ground for cancellation of the sublease was urged as an **alternative,** separately and independently of the grounds previously discussed. In other words, when O'Meara purchased the Tidewater lease on November 23, 1956, if (1) he was **not** judicially estopped from asserting same against McDonald, if (2) he was **not** estopped as lessee in possession from disputing McDonald's title to rent earned and accrued during such possession, if (3) he did **not** thereby purchase a litigious right which McDonald could acquire by refunding the purchase price, and if (4) O'Meara was still justified

in withholding payment to McDonald in order to **"protect"** himself on the grounds that McDonald's royalty was still being claimed by **"others,"** then, and only in that event, we submit that O'Meara was still obligated to make **monthly deposits** of the royalty **in escrow,** and his **failure** to do so amounts to **failure to pay rent,** which entitles McDonald to cancel the sublease.

The escrow agreement is clearly an amendment or modification [83] of the sublease because it provided a different method of paying rent (royalty), during pendency of litigation, from the method provided in the lease.[84] A failure to pay in accordance with the amendment or modification amounts to a failure to pay under the sublease itself.

As recited in the escrow agreement,[85] simultaneously with the execution of same, McDonald also executed and delivered to O'Meara a Division Order, **retroactive back to date of first runs,** authorizing O'Meara to purchase McDonald's royalty oil. The escrow agreement uses the **imperative mood**[86] in providing that:

> *"O'Meara* ***shall*** *continue to* ***purchase*** *and run the oil claimed by McDonald from said wells on said leases in accordance with the terms of the aforesaid Division Order, and O'Meara obligates himself to deposit each month in the hands of said Escrow Agent, the aforesaid portion thereof (claimed by McDonald)* * * *"*

The above quoted portion makes it clear that, insofar

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[83] 17 C.J.S. Contracts Sec. 379, page 869.

[84] The lease provided that in the event of an adverse claim, lessor could (1) withhold payment of rental, or (2) deposit same in the registry of the court. The escrow agreement abrogated both of these alternatives, and provided that the rent must be deposited in escrow monthly.

[85] Tr. pp. 54-61; at p. 55.

[86] Tr. p. 57.

as McDonald and O'Meara are concerned, **O'Meara himself** was the **purchaser,** obligated as such to deposit McDonald's portion in escrow, regardless of what subsequent disposition O'Meara made of said oil, and regardless of whether or not he **collected** the proceeds from The Texas Company or any other third party to whom he delivered same.

The escrow agreement provided that it would terminate only when and if:

(1) Final, unappealable judgment was rendered in the *Daspit-Broussard* suit, adjudicating the ownership of McDonald's oil, or

(2) McDonald effected a compromise with his adverse claimant, or

(3) The party (Tidewater Oil Company) claiming adversely to McDonald abandoned its claim.

The Court of Appeals read into the escrow agreement an additional time of termination which is not stated in the instrument. The Court held (erroneously, we submit) that O'Meara's obligation to make monthly escrow deposits terminated when the necessity of barging the oil from the island ceased. The Court's error stems from the following:

(1) The Court **infers** the intent of the parties largely from the **first sentence** of paragraph 4 of the escrow agreement, although the **second sentence** of the same paragraph **clearly states** an intent exactly opposite to that found by the Court.

(2) The Court's logic and reasoning are based upon disputed facts which it resolves adversely to McDonald's contentions.

Paragraph 4 of the escrow agreement reads as follows: (Our emphasis)

4. "McDonald authorizes and ratifies sale of oil at the lease to the present purchaser and takes cognizance of the necessity of barging said oil by the present purchaser. However, if any purchaser should hereafter be taking oil from any lease on Timbalier Island **without charging for the barging** of same, then neither O'Meara nor the present purchaser shall charge or deduct transportation cost, and O'Meara **shall then deposit in escrow** (in the manner and at the time aforesaid) the proceeds for said oil at the price posted in the field by the major purchaser in the field subject only to deduction for severance taxes."

We submit that the second sentence of the above paragraph completely negates the inference which the Court drew from the first sentence to support its ruling to the effect that O'Meara's obligation to make escrow deposits terminated when the necessity of barging ceased. The second sentence uses the imperative mood in stating that O'Meara **"shall then deposit in escrow"** clearly evidencing an intent that the obligation to make escrow deposits would continue regardless of barging vel non.

In reaching an opposite conclusion the Court of Appeals was largely influenced by its erroneous findings of fact. The Court said: (Our emphasis)

> *"The parties never intended the escrow agreement to apply to the period when the oil would be delivered to a* ***pipe line purchaser*** *and O'Meara* ***would have no funds*** *in his hands belonging to McDonald to be deposited with the escrow agent."*

The Court is obviously under the **erroneous impression** that The Texas Company built its own **private pipeline** and was a **pipeline purchaser.** That O'Meara had **no choice** but to deliver the oil into this private pipeline.

and let The Texas Company do as it pleased with the proceeds, and through no fault of his own, O'Meara was unable to obtain the proceeds from The Texas Company. The Court overlooks the fact that the common carrier, **Texas Pipeline Company**, would have transported said oil, via connecting carriers if necessary, to any purchaser designated by O'Meara, and O'Meara would have had no difficulty effecting collection. His right to **sell** and **collect** was perfect and undisputed by anyone, because:

1. The escrow agreement and division order annexed thereto gave him full authority to sell McDonald's oil and collect the proceeds.
2. He owned all of the rights of McDonald's former adverse claimant (Tidewater Oil Company), and there was no one who could question his right to sell and collect.

O'Meara's general counsel is eloquently silent as to whether or not he **disclosed** the above facts to **The Texas Company** in a **bona fide** attempt to collect McDonald's royalty and deposit same in escrow. In view of his deliberate failure to notify McDonald's attorney of the purchase of the Tidewater lease, it is most probable that he likewise failed to notify The Texas Company. It is **certain** that if he had given such **notice**, The Texas Company would have had **no reason** to **refuse** delivery of the proceeds to O'Meara, **unless** O'Meara notified The Texas Company that he (O'Meara) was **claiming** ownership of same **adversely** to McDonald.

Concluding this petition, we submit that the new Federal Rules of Civil Procedure were intended to simplify procedure, eliminate technicalities, and do justice between the parties, giving every man his day in court. A Motion for Summary Judgment under Rule 56 was intended to be allowed only in the **rare** case where there is

no genuine issue of **any** material fact, and **no dispute** as to any **secondary** facts and circumstances which collectively establish a primary material fact, and where there is no **possibility** that a litigant can prevail **under any circumstances.**

CONCLUSION

Petitioner respectfully submits that the United States Court of Appeals for the Fifth Circuit, in the respects above mentioned, has departed so far from the well established jurisprudence and procedure under Federal Rules of Civil Procedure, Rule 56, 28 U. S. C. in depriving petitioner of his right to a trial on the merits, as to call for the exercise of this Court's power of supervision by Writ of Certiorari.

Respectfully submitted,

ROBERT WEINSTEIN,
Attorney for Albert J. McDonald, Petitioner.

SYLVAN J. STEINBERG,
of
RITTENBERG, WEINSTEIN & BRONFIN,
ROBERT B. BUTLER, JR.
Of Counsel.

APPENDIX A

JUDGMENT

December 16, 1957

Christenberry, J

Albert J. McDonald

versus

Robert W. O'Meara, First City National Bank of Houston, Texas and Louisiana Land and Exploration Company	NO. 6739 Civil Action

This cause came on at a former day to be heard on the motions of the defendants, Robert W. O'Meara, The First City National Bank of Houston and T. W. Archer, for summary judgment, pursuant to rule 56 (a) of the Federal Rules of Civil Procedure, as well as on the motion of the defendant, The Louisiana Land and Exploration Company, to dismiss the complaint as against it, and after hearing argument of counsel for the respective parties, the matter was submitted, when the Court took time to consider;

Now, after due consideration of the contents of the pleadings and affidavits filed by the respective parties, the Court finds that there is no genuine issue as to any material fact and that the defendant, Robert W. O'Meara, The First City National Bank of Houston and T. W. Archer, are entitled to judgment as a matter of law, and the Court further finds that the motion of The Louisiana Land and Exploration Company to dismiss should be granted, and it is accordingly,

ORDERED, ADJUDGED and DECREED by the Court that the motions of the defendants, Robert W.

O'Meara, The First City National Bank of Houston and T. W. Archer for summary judgment and the motion of The Louisiana Land and Exploration Company to dismiss, be and the same are hereby, GRANTED, and the suit of plaintiff, Albert J. McDonald, as to all defendants, is hereby, DISMISSED, and that the defendant recover their costs.

APPENDIX B

IN THE
FOR THE FIFTH CIRCUIT

No. 17090

ALBERT J. McDONALD,

Appellant,

versus

ROBERT W. O'MEARA, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 27, 1958.)

Before RIVES, JONES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Albert McDonald sued Robert O'Meara and others[1] to cancel a mineral lease

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[1] McDonald brought suit in the District Court for the Parish of Terrebonne, Louisiana. Suit was removed to the United States District Court for the Eastern District of Louisiana. McDonald joined as defendants the First City National Bank of Houston and T. W. Archer, who hold mortgages secured by O'Meara's interest in the lease. Louisiana Land and Exploration, that holds a one-thirty-second overriding royalty from O'Meara, also was named as defendant.

(sublease) on the ground that O'Meara, the lessee, violated the lease in failing to pay the lessor his royalty (rents in accordance with their agreement. The narrow question to be decided is whether O'Meara's delivery of oil to the Texas Company, by pipe line, to be credited to McDonald's account, was payment to McDonald in accordance with the agreement between the parties. The district court found no genuine issue as to any material fact. The court granted defendant's motions for a summary judgment and dismissed the suit as to all defendants. We affirm this judgment.

I.

May 7, 1955, Phillip J. Dasprit granted a mineral lease to McDonald covering certain property on Timbalier Island in Terrebonne Parish, Louisiana. A month later McDonald subleased to O'Meara, but reserved an overriding royalty of one-eighth of the oil, gas, and other minerals produced. O'Meara completed his first well December 7, 1955 and later brought in three more wells.

Sometime before Daspit leased to McDonald, Felix Broussard leased the same property to Tidewater Associated Oil Company. To settle the ownership, Daspit sued Broussard. During this litigation O'Meara continued to drill and to operate the property, but because of uncertainty as to the outcome of the suit, he withheld payment of the royalty until May 31, 1956. On that date he entered into an escrow agreement with McDonald. The agreement required O'Meara to make payments to the Citizens National Bank & Trust Company of Houma, Louisiana, in escrow, pending final determination of the *Daspit v. Broussard* suit. May 22, 1957 final judgment was rendered recognizing Daspit's ownership.

From the completion of the first well, December 7,

1955, until January 23, 1957, because there was no pipe line connection at Timbalier Island, O'Meara barged the oil, selling at the point of barge delivery. O'Meara deposited with the escrow agent the amount due McDonald as his royalty for the period from December 7, 1955 to January 23, 1957. In the meantime, Texas Company constructed a pipe line to Timbalier Island, attaching it to O'Meara's wells January 23, 1957. After that date O'Meara made no further deposits to the escrow agent, since all of the oil produced was delivered to the Texas Company. The Texas Company prepared a division order recognizing McDonald's royalty interest. McDonald has refused to execute this division order and has allowed his share of the oil proceeds to remain with the Texas Company.

McDonald contends that O'Meara's failure to continue making deposits in escrow violated the sublease and is good ground for cancellation of the sublease. McDonald filed suit to cancel before the termination of the *Daspit v. Broussard* litigation.

II.

The original mineral lease from Daspit to McDonald contains the following provision for payment of royalty to the lessor: "Oil royalties shall be delivered to Lessor free of expense at Lessor's option *in tanks furnished by Lessor at the well or to Lessor's credit in any pipe line connected therewith.* In the event Lessor does not furnish tanks for such royalty oil and no pipe line is connected with the well, Lessee may sell Lessor's royalty oil at the best market price obtainable and pay Lessor the price received f.o.b. the leased property, less any severance or production tax imposed thereon."

The sublease to O'Meara stipulated that McDonald's

overriding royalty should be paid in the same manner as provided for in the original lease: "Assignor reserves to himself a one-eighth (1/8) of eight-eighths (8/8) overriding royalty out of all the oil, gas and other minerals produced, saved and marketed from the hereinabove described property; said overriding royalty shall be free of all cost to Assignor, and subject only to Assignor's proportionate share of the severance taxes which shall be due and payable thereon. *Said overriding royalty shall be paid and or delivered in the same manner as provided in said lease for royalties of the Lessors therein.*"

Under the terms of the lease and sublease, therefore, O'Meara's delivery of the oil to the pipe line, constituted delivery of the overriding royalty to McDonald. There is no doubt that delivery to a pipe line purchaser is the usual and preferred method of marketing oil. It is undisputed that all of the oil produced after January 23, 1957 was delivered to the Texas Company.

McDonald claims that the escrow agreement had the effect of amending the sublease, and that O'Meara's failure to continue payments to the escrow agent after January 23, 1957 therefore was a violation of the sublease.

It is unnecessary to determine whether the escrow agreement operated as an amendment to the sublease or as a separate contract. We read the escrow agreement as continuing during the *Daspit v. Broussard* litigation but as limited in its effect to the period when O'Meara was barging oil, selling it, and handling the entire proceeds. The parties never intended the escrow to apply to the period when the oil would be delivered to a pipe line purchaser and OMeara would have no funds in his hands belonging to McDonald to be deposited with the escrow agent.

The purpose and scope of the escrow agreement are clear enough. During the time O'Meara was barging the oil and selling it, he was accumulating a considerable sum of money. McDonald objected to O'Meara's possession of the money during the litigation over title. For O'Meara the purpose of the escrow was to put the royalty in the hands of a stakeholder until title could be determined. For McDonald the purpose was to protect his royalty while O'Meara was handling large sums derived from sales of the oil.

The agreement obligates O'Meara to deposit with the Houma Bank the proceeds from one-eighth of the oil, "less severance taxes and cost of collection, which O'Meara has previously sold". Then, "O'Meara shall continue to purchase and run the oil claimed by McDonald", depositing McDonald's portion "less severance taxes and costs of transportation". McDonald "takes cognizance of the necessity of barging said oil by the present purchaser". It seems to us, therefore, that the escrow dealt with a temporary situation and had meaning only as long as O'Meara was barging and selling the oil at the point of barge delivery, and had McDonald's funds in his hands. The lease and sublease clearly contemplate marketing of oil through a pipe line purchaser as standard operating procedure; failure to take advantage of the Texas Company pipe line to Timbalier would have exposed O'Meara to possible liability for not protecting the lessor's interests.

When final judgment was rendered in *Daspit v. Broussard*, May 22, 1957, the escrow by its terms ended. McDonald withdrew all of the proceeds representing his overriding royalty from the beginning of production to January 23, 1957. Proceeds due him after January 23, 1957 are being held for his account by the Texas Com-

pany, in accordance with the express terms of the sublease and lease, O'Meara's delivery by pipe line to the Texas Company of all the oil produced under the lease, with a proper credit to McDonald's account of his royalty interest, constituted payment to McDonald. O'Meara has done all that he was obligated to do under his agreements with his lessor.

III.

November 23, 1956, O'Meara purchased the mineral lease that Tidewater had acquired from Broussard. McDonald alleges that (1) the acquisition was concealed from him; (2) that, in effect, the acquisition perfected title to McDonald's lease from Daspit, since a lessee cannot dispute his lessor's title; (3) that O'Meara was placed in the position of having to pay McDonald immediately for the overriding royalty reserved on the Daspit lease.

There is no merit to these contentions. (1) The Tidewater lease was recorded on the public records of Terrebonne six months before McDonald filed suit. (2) Under the terms of the O'Meara sublease from McDonald the "Lessee shall have the right to purchase a lease or leases from others to protect its leasehold rights and shall not thereby be held to have disputed Lessor's title; and, in the event Lessor's title or interest therein is claimed by others, Lessee shall have the right to withhold payment of royalties or deposit such royalties in the registry of the Court until final determination of Lessor's rights." (3) At the time of O'Meara's purchase of the Tidewater lease the Daspit v. Broussard action was still pending. O'Meara had put himself in the position of protecting his leasehold, but there was uncertainty as to which lease was valid. He was justified therefore

in continuing to make deposits as provided in the escrow agreement.

We have considered the contentions of the Appellant's resourceful counsel in addition to those referred to in this opinion. There may be more to this case than meets the eye, as implied in the briefs and oral argument. But we are limited to what we find out in the open. The judgment is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana.

By: MEHRL D. FECHON,
Deputy

JUDGMENT

Extract from the Minutes of August 27, 1958

ALBERT J. McDONALD,

No. 17,090. versus

ROBERT J. O'MEARA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Albert J. McDonald, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING

Extract from the Minutes of October 8, 1958

ALBERT J. McDONALD,

No. 17,090 versus

ROBERT W. O'MEARA, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX C

Art. 2046. **Contracts in which resolutory condition implied; necessity of suit for dissolution**

Art. 2046. A resolutory condition is implied in all commutative contracts, to take effect, in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance.

Art. 2047. **Manner of obtaining dissolution; extension of time for performance of condition**

Art. 2047. In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event, not depending on the will of either party, the contract is dissolved of right, but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition.

Art. 2710 **Obligations of lessee arising from nature of contract**

Art. 2710 The lessee is bound:

1. To enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease.

2. To pay the rent at the terms agreed on.

Art. 2712 **Eviction for non-payment of rent**

Art. 2712 The lessee may be expelled from the property if he fails to pay the rent when it becomes due.

Art. 2729 **Failure of parties to fulfill obligations**

Art. 2729 The neglect of the lessor or lessee to fufill his engagements, may also give cause for a dissolution of the lease, in the manner expressed concerning contracts in general, except that the judge can not order any delay of the dissolution.

FILE COPY

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FILED
JAN 20 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 610

ALBERT J. McDONALD,
Petitioner and Appellant Below,

versus

ROBERT W. O'MEARA, ET AL.,
Respondents and Appellees Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN L. TOLER,
1500 National Bank of Commerce,
New Orleans, Louisiana,
Attorney for First City National Bank of Houston and T. W. Archer.

HARRY McCALL, JR.,
1500 National Bank of Commerce,
New Orleans, Louisiana,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 610.

ALBERT J. McDONALD,
Petitioner and Appellant Below,

versus

ROBERT W. O'MEARA, ET AL.,
Respondents and Appellees Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable Chief Justice and Associate Justices Of the Supreme Court Of The United States:

First City National Bank of Houston and T. W. Archer, respondents, file this brief in opposition to the application for writ of certiorari herein by Albert J. McDonald.

Respondents' opposition is predicated not only on the correctness of the decision of the District Court and the Court of Appeals as to the absence of any genuine issue

of fact, but, more particularly, on their status of purchasers on the faith of the public records. As such, they are fully protected by the law of Louisiana and their rights as mortgagee and obligee of oil payments may not be affected by the cause of action sought to be asserted herein.

No mention is made of respondents in the petition for Writ of Certiorari herein (pp. 5-11) and, but for the "et als" in the title and the mention of respondents by name in the District Court judgment (Appendix A), one would think the action herein to be solely against Robert W. O'Meara. This is not the fact, as respondents First City National Bank of Houston and T. W. Archer are made defendants in the action herein and the cancellation of the mineral sublease upon which their rights depend is sought to their prejudice.

There is no serious question of violation of the mineral sublease as written, petitioner's contention actually being that O'Meara has violated his sublease *as amended by the Escrow Agreement* (Brief pp. 6-7, complaint Para. 8-9). This Escrow Agreement was not alleged by Petitioner to have been recorded, nor was it in fact recorded. Consequently, when the Bank took its mortgage and Archer acquired his oil payment, the agreement which petitioner now asserts to have been violated was not of record and therefore could not affect the rights of these respondents.

The Louisiana law of registry is set forth in Article 2251 et seq.; the particular article which controls the rights of the parties herein is 2266, which reads, in part:

> "All sales, contracts, and judgments affecting immovable property, which shall not be so recorded shall be utterly null and void, except between the parties thereto. . ."

The requirement of recordation is reiterated specifically as to mineral leases by R.S. 9:2721 (Act 7, 2nd Ex. Sess. 1950) sections 1 and 2 of which read as follows:

> "Sec. 1. No sale, contract, counter letter, lien mortgage, judgment, surface lease, oil gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.
>
> "Sec. 2. Third persons or third parties so protected by and entitled to rely upon the registry laws of Louisiana now in force and effect and as set forth in this Chapter are hereby redefined to be and to include any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as purchaser, mortgagee, grantee or vendee of servitude, or royalty rights, or as lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease and all other third persons or third parties acquiring any real or personal right, privilege or permit relating to or affecting immovable property."

The courts of Louisiana have consistently and literally applied the law of registry, the leading case being *McDuffie v. Walker*, 51 So. 100, 125 La. 132 (1909), in which the court said:

> "It is evident that whether a person acquires an interest in real estate to the extent of its value or part of its value as a mortgagee or as a vendee the principle involved in the application of the law of registry is the same; . . . The law makes no distinction between mortgages and sales or between creditors and vendees or mortgagees; nor does it discriminate between those who acquire property with knowledge of unrecorded contracts and those who acquire without such knowledge. Its purpose is to establish and enforce as a matter of public policy upon the subject of the most important property right with which it deals the rule that unrecorded contracts affecting immovable property shall be utterly null and void, except between the parties thereto. No language could be plainer or more emphatic, and the courts have no more power to read into the rule established by it an exception, not contained in it, than they would have to read such an exception into the rule that a verbal sale of immovable property shall not affect third persons. (P. 105.)

Similarly, in *Schneidau v. New Orleans Land Company*, 61 So. 225, 132 La. 264 (1912-13), the court stated that the rule

> ". . . provided a method intended to be simple, sure, and inflexible, whereby those who desire to invest their money in real estate may be able to find, upon the public records, the evidence, and all the evidence, needed to establish or defend the title thereto, and

upon the further belief that the law which has been enacted to that end would be improperly interpreted and its purpose defeated, if it were held that an unrecorded vendee could convey to another a title good against a purchaser from the owner of record and good against the world." (P. 230.)

In *Bell v. Canal Bank & Trust Co.*, 190 So. 359, 193 La. 142 (1939), the plaintiff brought a jactitation suit to recover certain real property which had been mortgaged by the record owner to the Prudential Life Insurance Co., and on which defendant (which had acquired the note and mortgage) had foreclosed. The basis of plaintiff's suit was the fraud of the record owner in falsely alleging in previous proceedings to quiet title that he did not know the heirs of plaintiff's ancestor in title or their address. A Judgment to that effect and setting aside the tax sale was rendered in a suit to which defendant was not a party, but there was no evidence in the instant case that defendant had any knowledge or information of the alleged fraud. The court's language in affirming the lower court judgment in favor of the bank is precisely applicable to the facts of this case:

"The jurisprudence is clear under the law of registry that a purchaser of real estate in good faith from the owner of record and without notice cannot be affected by latent equities and secret rights which may have existed in favor of former owners of the property dehors the public records. (Citing authority.)

"The law is well settled that a third person can acquire a good title to immovable property from the owner of record, even though he has been appraised

of the equities or rights of others in the property that did not appear of record, in accordance with the law of registry. (Citing authority.)

"The Prudential Insurance Company of America, having been granted a mortgage on the property on April 16, 1927, to secure the note of $1500, which sum of money it advanced to Dr. Houston L. Staring, who was the sole and only record owner of the property—and there being nothing registered or recorded in connection with the title to show any defects therein or equities or rights of Manuel Bell, Sr., or his heirs, the Insurance Company, as a third party, relying upon the public records and the law of registry is protected against latent rights and secret equities of former owners dehors the record. The Canal Bank & Trust Company, in Liquidation, having purchased, in due course of business, the note secured by the mortgage, without any knowledge or notice of the claims or rights of the heirs of Manuel Bell, Sr., certainly acquired the same rights obtained by the Prudential Insurance Company of America in the mortgage and the note.

. . . . . .

". . . In the instant case, the Prudential Life Insurance Company of America, an innocent party, which took the mortgage from the record owner, relying upon the public records and law of registry, which in no way indicated the latent rights and equities of the claimants, was entitled to a superior and better right to the property over the claimants. The Canal Bank, its transferee, was likewise entitled to assert the same right." (P. 365.)

Most recently, in *Buras Ice Factory v. Department of Highways*, 103 So. (2d) 74, 235 La. 158 (1957-8):

". . . . . appellant invokes and relies on the legal principle that innocent third parties who deal on the faith of the public records are protected thereby.

(1) Appellee does not dispute this legal principle, well recognized in our codal law and jurisprudence. See Revised Civil Code Articles 2254, 2264, 2266; McDuffie v. Walker, 125 La. 152, 51 So. 100; Gonsoulin v. Sparrow, 150 La. 103, 90 So. 528; Derryberry v. Matterson, 193 La. 624, 192 So. 78; Quatre Parish Co. v. Beauregard Parish School Board, 220 La. 592, 57 So. 2d 197 . . . . . "

CONCLUSION

Respondents respectfully submit that there is no occasion for exercise by this Honorable Court of its supervisory jurisdiction for the reasons that petitioner has failed to demonstrate the existence of a genuine issue of fact and for the further reason that these respondents are protected against petitioner's attack by the Louisiana law of registry, wherefore the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN L. TOLER,
Attorney for First City National Bank of Houston and T. W. Archer.

HARRY McCALL, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

No. 610

ALBERT J. McDONALD,
Petitioner and Appellant Below,

vs.

ROBERT W. O'MEARA, FIRST CITY NATIONAL BANK OF HOUSTON, TEXAS, F. W. ARCHER, and THE LOUISIANA LAND AND EXPLORATION COMPANY,
Respondents and Appellees Below.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT, THE LOUISIANA LAND AND EXPLORATION COMPANY, IN OPPOSITION.

M. TRUMAN WOODWARD, JR.,
G. HENRY PIERSON, JR.,
H. H. HILLYER, JR.,
1122 Whitney Building,
New Orleans, La.,
Attorneys for the Louisiana Land and Exploration Company.

HAUSER PRINTING CO., INC., NEW ORLEANS

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STATUTES AND REGULATIONS INVOLVED

The statutes, and other regulations involved are Louisiana Revised Statutes of 1950, Title 9, Section 4105 and Louisiana Civil Code Article 2266. They are printed in Appendix A, *infra*, p. 7.

STATEMENT

The Louisiana Land and Exploration Company ("Land Company"), for purposes of this Opposition deems a statement of fact unnecessary.

ARGUMENT

I.

Petitioner Does Not Challenge The Merit Of Land Company's Motion To Dismiss

Petitioner's application for a writ of certiorari must be denied as to Land Company for it does not request a review of Land Company's motion to dismiss.[1] Admittedly, petitioner requests a review of the judgment of the Court of Appeals,[2] but an examination of the petition reveals petitioner to be concerned solely with obtaining a review of the summary judgment[3] which was granted all respondents, except Land Company.[4] The merit of Land Company's motion to dismiss is neither challenged nor raised by petitioner; in fact, petitioner never referred to Land Company. In setting forth the statutes involved in this case,[5] as required under Rule 40-1-(c),[6] the petitioner sets out the Federal Rule of Civil Procedure under which the summary judgment was granted; he did not set out the Federal Rule of Civil Procedure under which Land Company's motion to dismiss was granted. Again, in concluding his argument,

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[1] See Supreme Court Rule 23-1(c), 28 U.S.C.; *Irvine v. State of California*, 347 U.S. 128, 129, 98 L. Ed. 561, 567, 74 S. Ct. 381 (1958); *Rorick v. Devon Syndicate*, 307 U.S. 299, 302, 83 L. Ed. 1303, 1306; 59 S. Ct. 877 (1939); *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 179, 82 L. Ed. 1273, 1275, 58 S. Ct. 849 (1938).

[2] Petition p. 1

[3] Petition, p. 2, 6, 12, 15, 24, 38

[4] See *Connecticut Railway & Light Company v. Palmer*, 305 U.S. 493, 496, 83 L. Ed. 309, 59 S. Ct. 316 (1939)

[5] Petition p. 4

[6] Supreme Court Rule 40-1-(c), 28 U.S.C.

petitioner refers only to the summary judgment and reasons for reviewing its granting.[7] Since only questions raised in the petition for certiorari will be considered by the Court,[8] the petition should be dismissed as to Land Company.

II.

Certiorari Is Not Applicable

Alternatively, the present case concerns a narrow question unlikely to reoccur governed by state law, which turns solely upon the construction of particular instruments (which themselves are the sole law between the parties[9]); it thereby fails to fall within the spirit of Rule 19[10] and certiorari must be denied.[11] The questions presented by petitioner do not concern conflicting decisions,[12] principles of rational importance,[13] or a federal question,[14] and only the actual litigants will be affected by the questions presented.[15] Furthermore, the issues involved have been correctly passed on by two courts well versed in the law of Louisiana and should not be passed on again.[16] Petitioner is one of the great mass of applicants for a writ of certiorari, who merely seek one last

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[7] Petition p. 38, 39

[8] See note 1 *supra.*

[9] *Mallett v. Union Oil and Gas Corporation*, 232 La. 157, 94 So. (2d) 16 (1957)

[10] Supreme Court Rule 19, 28 U.S.C.

[11] *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74-75, 99 L. Ed. 897, 901, 75 S. Ct. 614 (1955)

[12] As in *Affront v. United States*, 350 U.S. 79, 100 L. Ed. 762, 76 S. Ct. 171 (1955)

[13] As in *Panama Canal Company v. Grace Line*, 356 U.S. 309, 2 L. Ed. (2d) 788, 78 S. Ct. 752 (1958)

[14] As in *Watkins v. United States*, 354 U.S. 178, 1 L. Ed. (2d) 1273, 77 S. Ct. 1173 (1957)

[15] *Cf. Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164 (1924); *United States v. Rimer*, 220 U.S. 547, 55 L. Ed. 578, 31 S. Ct. 596 (1911)

[16] *Cf. Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 707, 708, 93 L. Ed. 330, 338, 69 S. Ct. 301 (1949); *Helvering v. Stuart*, 317 U.S. 154, 163, 87 L. Ed. 154, 160, 63 S. Ct. 140 (1942)

review of an adverse decision, and whose application must be denied if the Court is to remain effective.[17]

III.

The Decision Below Was Correct

The original complaint[18] set forth as grounds for cancellation of a mineral lease alleged violations of obligations undertaken by O'Meara in the "Escrow Agreement",[19] which obligations were not attached to the lease[20] when Land Company acquired its interest. The motion to dismiss was levelled, in part, at the theory of the complaint that violation of the "Escrow Agreement" entitled plaintiff to cancellation as to Land Company. The law of Louisiana, which admittedly applies, is clear.

> "Neither party to a contract has any power to change his obligations to a third party, growing out of said contract, by subsequently altering or prolonging its execution as between themselves."[21]

Here, Land Company was not a party to the Escrow Agreement and such agreement can not be used against it.

An overriding royalty interest is a "real right and incorporeal immovable property".[22] The recordation of the instrument evidencing such interest is notice to the world,[23] including the lessee and his predecessors in title to

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[17] Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, St. Louis. Daily Record (Sept. 8, 1949, p. 1); *Magnum Import Co. v. DeSportsvino Coty*, 262 U.S. 159, 163; 67 L. Ed. 922, 924 (1923)

[18] Tr. p. 22

[19] Tr. p. 54-61.

[20] Tr. p. 34-51.

[21] *Sargeant v. Downey*, 14 La. 43 (Syllabus); see also *Keystone v. Lambreaux*, 6 La. Ann. 26; *Parker v. Webb*, 205 La. 799, 18 So. (2d) 198.

[22] R.S. 9:1105, (La.)

[23] *Cf. Logan v. Union Sulphur Co.*, 29 F. Supp. 33 (D.C. La.); *Alexandria Production Credit Ass'n v. Horn*, 199 So. 430 (La. App.)

the lease, that the lessee may not amend said lease to the prejudice of said overriding royalty interest.[24] The Complaint contends that the unrecorded Escrow Agreement sought to do just that. If it did, it is null[25] as to Land Company and no violation of its terms can affect Land Company's rights.

The lease entered into between O'Meara and McDonald provides that the lessee may "purchase a lease from others to protect its leasehold rights"[26] without disputing the lessor's title; it further provides that if the "Lessor's title or an interest therein is claimed by others",[27] the lessee may withhold payment of royalties until the final determination of lessor's rights.

Petitioner's "title or an interest therein" was claimed by others and litigated in *Daspit, et al. v. Broussard, et al.*[28] O'Meara withheld royalties during the conflict of interest as permitted under the terms of his lease. This clearly did not constitute a violation of the lease obligations enabling petitioner to seek cancellation of the lease; as such, a writ of certiorari should be refused petitioner.

CONCLUSION

For the foregoing reasons it is respectfully sub-

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[24] *Cf. George v. Manhattan Land & Fruit Co.*, 51 F. (2d) 28 (C.C.A. 5th); *McGee v. Louisaina Lumber Co.*, 124 La. 696; 49 So. 475.

[25] *Cf.* Art. 2266, La. Civil Code. See also: *Kaufman v. Arkansas Fuel Oil Co.*, 133 F. (2d) 787 (C.C.A. 5th); *Braswell v. Columbia County Development*, 153 La. 691, 96 So. 534. *Cf.* cases cited above, note 21.

[26] Tr. p. 48

[27] Tr. p. 48

[28] Tr. p. 333 *Daspit, et al. v. Broussard, et al.*, No. 17,504, 17th Judicial District Court, Parish of Terrebonne, Louisiana.

mitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

M. TRUMAN WOODWARD, JR.,
G. HENRY PIERSON, JR.,
H. H. HILLYER, JR.,
1122 Whitney Building,
New Orleans, La.,
Attorneys for the Louisiana Land and Exploration Company.

APPENDIX A

La. R.S. 9:1105.

Oil, gas and other mineral leases, and contract applying to and affecting these leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges, and obligations resulting therefrom, are classified as real rights and incorporeal immovable property. They may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of these rights, without the concurrence, joinder, or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. This Section shall be considered as substantive as well as procedural so that the owners of oil, gas and other mineral leases and contracts within the purpose of this Section shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate. As amended Acts 1956, 2nd Ex. Sess., No. 6, § 1.

Louisiana Civil Code, Art. 2266.

All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording.

The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer.